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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE, Plaintiff and Respondent, v. JESUS ALEXANDER MEJIA, Defendant and Appellant.	C081313 (Super. Ct. No. CRF1402)

A jury convicted Jesus Alexander Mejia of attempted murder, assault with a deadly weapon, shooting at an occupied vehicle, and being an active participant in a criminal street gang. The jury also found true various firearm and gang enhancement allegations. The trial court sentenced defendant to an aggregate determinate term of 45 years plus an indeterminate term of 25 years to life.

Defendant now contends (1) accomplice testimony was not corroborated by independent evidence connecting him to the shooting; (2) the trial court violated his right to confront witnesses by preventing cross-examination on the topic of the punishment his accomplices would have faced had they not cooperated with the prosecution; and (3) this matter should be remanded to permit the trial court to exercise its discretion to strike the

section 12022.53 firearm enhancements pursuant to the recent amendment to Penal Code section 12022.53, subdivision (h).[1] In addition, following supplemental briefing, defendant further contends (4) the attempted murder convictions must be reversed because Senate Bill No. 1437 eliminated the natural and probable consequences doctrine basis for attempted murder liability.

We will affirm the convictions but remand to permit the trial court to exercise its discretion regarding the section 12022.53 firearm enhancements. We will also direct the trial court to correct the abstract of judgment to reflect the orally-imposed sentence.

BACKGROUND

Jonathan D. drove his car to a market on December 31, 2013.[2] His girlfriend and three children were also in the car. Jonathan's mother Susan D. followed Jonathan in her burgundy-colored car. Her boyfriend and grandson were in her car. Jonathan parked his car at the market and Susan stopped behind Jonathan's car. Susan had seen another car following them as they drove to the market, and store surveillance video showed the car drive by. Jonathan heard a pop when he exited his car. He ducked behind his car door and heard more pops. There were four to five gunshots.

A witness saw a car with four or five people shooting at another car. The individuals in the front passenger seat and the seat behind the front passenger shot at Jonathan's car. Jonathan had a gunshot wound to his wrist, a window of his car was shattered, and there were bullet holes in his car.

Jonathan told a Yuba County Deputy Sheriff that an individual named Martin was one of the people who shot at him because Martin was a northerner. Martin Gonzales

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[1] Undesignated statutory references are to the Penal Code.

[2] We variously refer to individuals by first or last names or initials to promote clarity and victim privacy.

was a Norteño gang member who lived at Peach Mobile Estates (Peach Mobile). Jonathan was a southsider. Authorities arrested Gonzales, but Jonathan refused to further cooperate with law enforcement, saying he was not a snitch. At trial, Jonathan testified he did not see who shot him. Susan testified Gonzales was not a shooter.

E.S. saw her boyfriend Javier Hernandez with defendant on the evening of the shooting. Hernandez was driving a tan-colored car with large chrome rims. Hernandez and defendant drove by E.S.'s house about three times, honking at E.S. Hernandez ultimately turned himself in to police. At trial, E.S. claimed she lied to authorities about seeing Hernandez with defendant because she was trying to get Hernandez in trouble. However, in a recorded conversation between E.S. and Hernandez after the shooting, E.S. asked Hernandez why he passed by her house. When Hernandez said he did not remember doing that, E.S. replied, "Yeah, you guys passed by my house three times."

Christopher Hammonds was a friend of defendant and they lived near each other. Police arrested Hammonds. Susan testified Hammonds was not a shooter.

Susan identified defendant's tan Grand Marquis car as the shooters' car. But she did not identify defendant as a shooter. Police arrested defendant. Rap lyrics found in defendant's jail cell tended to incriminate him in a shooting. The lyrics read, "About two years ago I was in the streets, rocking pistol in my waist, pants sagging while I was walking . . . . Then I hit county jail . . . . So many homies switching up,[3] I don't know who to trust . . . . Then three homies packt you out because they knew that you wasn't. Next thing you know, escorted by the po-po, rolled out the pod, because what you did was a no-no. Back on the streets. I would dump it, fun, pull the hammer back and watch them all duck and run. Pop, pop, pop go the sound of my gun. I hope to beat my

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3 "Switching up" means snitching.

case . . . . And I'm praying to God, knowing that he will bring me home. Forgive me, Lord . . . . I was named after your son. . . ."

Yuba County Sheriff's Deputy Brandon Charter and Yuba County Sheriff's Detective Benjamin Martin testified as the People's gang experts. They explained that the Norteño gang and the Sureño gang are rival gangs. They described the colors, tattoos and symbols associated with the Norteño and Sureño gangs, the primary activities of the Norteño gang and the number of Norteño gang members in Yuba County. Detective Martin described crimes committed by Norteño gang members. Deputy Charter said the Norteño gang is a criminal street gang.

Varrio Linda Rifa (VLR) is a subset of the Norteño gang. Detective Martin described the symbols, hand sign, color and number of members for VLR. The experts opined that defendant was an active participant in VLR. Detective Martin's opinion was based on defendant's association with admitted gang members and prior validations. At the time he was booked in jail, defendant identified himself as a Norteño. He had Norteño-related tattoos on his chest and wrist. He associated with and committed crimes with Norteños. Detective Martin opined that Hammonds, Hernandez and Gonzales were also active Norteño gang members. Detective Martin opined that the market shooting was committed in association with Norteño gang members and benefited the Norteño gang.

Defendant said he loaned Hernandez his car on the day of the shooting and defendant stayed home that night. The next day, Hernandez told him something happened the prior evening. In addition, Hammonds said he and Gonzales shot Jonathan after following Jonathan to the market. Hammonds said Gonzales's "big homey" told them they would earn stripes if they shot Jonathan.

Defendant admitted his car was used during the shooting and that he asked someone to hide the car after the shooting. Defendant testified his family members told him deputies were looking for him for five counts of attempted murder, so he hid from

the authorities. He testified he was a VLR Norteño gang member. According to defendant, Hammonds and Gonzales were also VLR Norteño gang members. Defendant admitted he had altercations with Jonathan multiple times before December 31, 2013, because he was a VLR Norteño while Jonathan was a Sureño. He said people who associated with Jonathan jumped defendant in late November or early December.

Defendant's sister said if defendant was at the shooting he did not do anything and was just there. But at trial she testified that defendant did not leave their home after about 3:30 p.m., and she did not see Hernandez at all that afternoon.

Defendant challenges the following accomplice testimony as uncorroborated. Hammonds testified that he fired a pistol at the market on December 31, 2013. Hernandez, Gonzales and defendant were in the car with him during the shooting. Hernandez drove defendant's car. Defendant was in the front passenger seat. Hammonds sat behind defendant and Gonzales sat behind Hernandez. Hammonds, a VLR gang member, saw Jonathan, a Sureño, flip them off. They followed a red car and Jonathan's green car to the market. Hammonds saw Susan's grandson throwing Sureño gang signs. The people in defendant's car felt disrespected and were angry. Hernandez said, "Fuck that scrap." Scrap is a derogatory term northerners called southerners. Defendant said "Fuck that fool. He called me and my big homey a bitch" and "Let's stomp this fool." Gonzales placed a .22 caliber revolver on the seat next to Hammonds. After Jonathan's car and the red car pulled into the market and stopped, defendant and Hammonds shot at the driver's side of Jonathan's car. Defendant fired a .38 caliber revolver. Hammonds fired a .22 caliber revolver. Defendant said he thought he hit his target. They shot at Jonathan because he was a Sureño and had disrespected Hammonds and his cohorts.

Gonzales testified he was with defendant, Hammonds and Hernandez at around 6:00 p.m. on December 31, 2013. They were in defendant's car. Defendant was driving. Hammonds was in the front passenger seat. Gonzales sat behind Hammonds. Hernandez

sat next to Gonzales. They were all VLR Norteño gang members. Peach Mobile, where Gonzales lived, was in Norteño territory. They planned to look for rival gang members and go "mobbing," which meant they were going to commit a crime. They saw Jonathan, a Sureño, at Peach Mobile. They followed Jonathan to the market. Gonzales tried to talk the others out of shooting because there were kids in Jonathan's car. But Hammonds and Hernandez started shooting when Jonathan got out of his car. Gonzales put his head down and Hernandez shot above Gonzales's head. There were five or six gunshots. Hammonds and Hernandez used a .38 and a .22 caliber revolver. Hernandez used the smaller gun. Gonzales and defendant did not fire a gun. Gonzales did not provide anyone with a gun.

Hernandez testified he was with Hammonds and defendant and they picked up Gonzales in defendant's car 15 to 20 minutes before the shooting. Hernandez drove defendant's car. Defendant sat in the front passenger seat. Gonzales sat behind Hernandez. Hammonds sat next to Gonzales. Hernandez was a VLR Norteño gang member. After they saw Jonathan's car, Hernandez and his cohorts formulated a plan to shoot at Jonathan's car because Jonathan was a Sureño. After Jonathan's car pulled into the market parking lot, defendant fired two shots with a .38 caliber revolver. Hammonds fired one shot with a .22 caliber revolver Gonzales gave him. Hernandez did not shoot.

The jury convicted defendant of attempted murder (§§ 664, 187, subd. (a) -- counts 1 through 5), assault with a deadly weapon (§ 245, subdivision (a)(2) -- counts 6 through 10), shooting at an occupied vehicle (§ 246 -- count 11), and being an active participant in a criminal street gang (§ 186.22, subd. (a) -- count 12). The jury also made the following additional findings: that the attempted murders were not willful, deliberate and premeditated; that the gang enhancement allegations in counts 1 through 11 were true (§ 186.22, subds. (b)(1)(B), (b)(1)(C), (b)(4)(B)); that defendant willfully and unlawfully carried a firearm on his person or in a vehicle during the commission of a street gang crime in connection with counts 1 through 10 (§ 12021.5, subd. (a)); that a principal

committed the attempted murders while using and discharging a gun for the benefit of, at the direction of, or in association with a criminal street gang (§ 12022.53, subd. (e)(1)); that defendant did not personally use a firearm (§§ 12022.5, subd. (a), 12022.53, subds. (b), (c) and (d)); and that defendant did not personally inflict great bodily injury on a non-accomplice in the offenses against Jonathan (§ 12022.7, subd. (a)).

The trial court sentenced defendant to an aggregate determinate term of 45 years plus an indeterminate term of 25 years to life. Among other things, the trial court imposed a sentence of 25 years to life for the section 12022.53, subdivision (e)(1) enhancement in connection with count 1, and six-year eight-month sentences for the section 12022.53, subdivision (e)(1) enhancements in connection with counts 2 through 5. But the abstract of judgment incorrectly indicates the 25-year-to-life sentence and the six-year eight-month sentences were imposed pursuant to section 12022.53, subdivisions (c) and (d).

The trial court also imposed but stayed a 15-year-to-life sentence on count 11 and a 10-year term for the section 186.22, subdivision (b)(1)(C) enhancement on that count. But the abstract of judgment does not reflect those aspects of the orally-imposed sentence.

DISCUSSION

I

Defendant challenges the testimony from Hammonds, Hernandez and Gonzales, because the testimony from the accomplices was not corroborated by independent evidence connecting him to the shooting.

The trial court instructed the jury that Hammonds, Hernandez and Gonzales were accomplices as a matter of law. A defendant cannot be convicted based on the testimony of an accomplice unless that testimony is corroborated by other evidence tending to connect the defendant with the charged offense. (§ 1111; *People v. Szeto* (1981) 29 Cal.3d 20, 27 (*Szeto*).) The corroboration must do more than merely show the

commission or circumstances of the offense. (§ 1111.) This requirement serves to ensure that the defendant will not be convicted solely upon the testimony of an accomplice because an accomplice is likely to have self-serving motives. (*People v. Davis* (2005) 36 Cal.4th 510, 547.)

There is no need to corroborate every fact to which an accomplice testifies; it is sufficient if the evidence tends to connect the defendant with the offense in a way that reasonably may satisfy a jury that the accomplice is telling the truth. (*Szeto, supra,* 29 Cal.3d at p. 27.) The corroborating evidence must relate to some element of the crime but need not be sufficient by itself to establish every element of the offense. (*Ibid*.) The corroborating evidence may be slight and entitled to little consideration when standing alone. (*Ibid*.)

The requisite corroboration may be established by circumstantial evidence. (*People v. Williams* (2013) 56 Cal.4th 630, 678 (*Williams*).) The defendant's statements and testimony can also corroborate accomplice testimony. (*People v. Williams* (1997) 16 Cal.4th 635, 680; *People v. Santo* (1954) 43 Cal.2d 319, 327 [the defendant's contradictory statements in relation to the charge are corroborative evidence].) But the testimony of an accomplice cannot corroborate that of another accomplice. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1222.) " '[U]nless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably tend to connect a defendant with the commission of a crime, the finding of the trier of fact on the issue of corroboration may not be disturbed on appeal.' [Citation.]" (*Szeto, supra,* 29 Cal.3d at p. 27, italics omitted.)

Here, defendant argues the non-accomplice testimony was insufficient to connect him to the shooting. We disagree.

There was independent evidence that defendant was involved in the shooting. Defendant's first name is Jesus and the author of the rap lyrics found in defendant's cell said he was named after God's son. The lyrics described carrying a pistol in the streets,

shooting, and watching them all duck and run. The author complained about individuals snitching. The author said that when three homies "packt [him] out" he was "escorted by the po-po, rolled out the pod, because what [he] did was a no-no." Defendant was arrested after three of his fellow gang members were taken into custody in relation to the shooting. Hammonds, Hernandez and Gonzales cooperated with the prosecution and testified against defendant.

In addition, there was independent evidence that defendant had a motive to shoot Jonathan. (*Szeto, supra*, 29 Cal.3d at pp. 28-29; *People v. McDermott* (2002) 28 Cal.4th 946, 986.) Defendant testified he was a Norteño gang member. Jonathan admitted he was a Sureño. Defendant said he had multiple altercations with Jonathan prior to the shooting because the two were rival gang members. Defendant added that he was jumped in late November or early December by people who associated with Jonathan. Defendant's trial testimony indicated he was willing to arm himself and assault Jonathan and other Sureño gang members. Detective Martin opined that defendant, Hammonds, Hernandez and Gonzales were active Norteño gang members and the shooting benefitted the Norteño gang.

Evidence was also presented that defendant attempted to hide his car and evade law enforcement after the shooting, raising an inference of consciousness of guilt. (*Williams, supra*, 56 Cal.4th at p. 679; *People v. Zapien* (1993) 4 Cal.4th 929, 983.) Defendant did not dispute that his car was used during the shooting. His testimony established his flight and his attempts to evade law enforcement and hide his car.

There was also evidence that defendant had the opportunity to commit the charged crimes. (*Szeto, supra*, 29 Cal.3d at pp. 28-29.) Among other things, E.S.'s pretrial statement placed defendant with Hernandez prior to the shooting in a car that matched the description of defendant's car. E.S.'s pretrial statement was consistent with her jailhouse conversation with Hernandez about three weeks after the shooting. Her pretrial statement was also consistent with the pretrial statement of defendant's sister that defendant did not

get home until 8:00 or 9:00 p.m. The sister's pretrial statement contradicted defendant's testimony that he was home all evening.

Moreover, independent evidence corroborated the testimony of Hammonds, Hernandez and Gonzales in other respects. (*People v. Pedroza* (2014) 231 Cal.App.4th 635, 659 [though insufficient by itself, evidence corroborating the circumstances or details of the crime "may form part of a picture indicating the jury may be satisfied that the accomplice is telling the truth"].) Susan corroborated the accomplice testimony that defendant's car followed Jonathan's car to the market. Another witness corroborated the accomplice testimony that there were four people in the shooters' car. Susan testified that the people seated on the passenger's side of the car shot at Jonathan's car and the person in the front passenger seat had a bigger gun. That testimony corroborated the accomplice testimony that there was a .38 and a .22 caliber revolver in defendant's car and the person in the front passenger seat shot with the .38 caliber revolver; it also corroborated the testimony by Hammonds and Hernandez regarding where the shooters sat in the car.

Viewed together and in a light most favorable to the verdict (*People v. Garrison* (1989) 47 Cal.3d 746, 774), the foregoing evidence was sufficient to corroborate the trial testimony of accomplices Hammonds, Hernandez and Gonzales and tended to connect defendant to the charged crimes.

II

Defendant next argues the trial court violated his right to confront witnesses by preventing cross-examination on the topic of the punishment his accomplices would have faced had they not cooperated with the prosecution.

A

After the prosecutor completed his direct examination of Hammonds but before cross-examination began, defendant's trial counsel sought leave to question Hammonds about the maximum sentence he faced had he not entered into a plea agreement. Defense

counsel argued the jury needed to know what Hammonds was thinking when he accepted a sentence of 22 years rather than risking the sentence he could have received. Counsel claimed such evidence was relevant to Hammonds's state of mind and credibility.

The prosecutor objected that defendant and his accomplices had faced similar circumstances and thus the proposed cross-examination would inform the jury of defendant's potential punishment. The prosecutor argued it would be improper for the jury to consider punishment in reaching its verdict, adding that if the trial court allowed the proposed cross-examination there would also need to be an explanation of the stay provisions in section 654.

The trial court agreed the jury should not know defendant's potential sentence. Pursuant to Evidence Code section 352, defense counsel could ask Hammonds about his dismissed counts and whether Hammonds had faced more time, but counsel could not elicit specific penalties. The trial court ruled the excluded evidence was prejudicial and the point could be made in other ways.

On cross-examination, Hammonds admitted lying to law enforcement authorities before he struck his plea deal. He testified that, as part of his plea agreement, all counts except one would be dismissed. He said he knew he would face far greater time if convicted on the other counts and acknowledged that his motivation in signing the plea agreement was to avoid spending the rest of his life in prison. He told the jury he wanted to get the least amount of time possible and disclosed that he would not be sentenced until after he testified at defendant's trial.

Gonzales also testified that he entered into a plea agreement. He said he pleaded guilty to attempted murder and gang and gun enhancements, agreed to serve 15 years in prison, and had to serve 85 percent of his sentence before becoming eligible for parole. He said his agreement required him to tell the truth at trial and the judge would decide whether he told the truth. On cross-examination, Gonzales said instead of facing a whole lot of time, he was getting 15 years under his plea deal.

Hernandez testified that he initially refused to cooperate with the prosecution but ultimately agreed to a plea deal. He said he pleaded to attempted murder without premeditation, a gang charge and a gun allegation and agreed to a prison term of 15 years at 85 percent. On cross-examination, Hernandez acknowledged that as part of the agreement, four counts against him were dismissed. He agreed so he would receive 15 years rather than a lot more time, adding that he agreed to tell the truth and the judge would decide if he was truthful.

B

"The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' " (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [89 L.Ed.2d 674, 682-683].) " ' "[T]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." ' [Citation.] . . . '[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.' [Citation.]" (*Id.* at pp. 678-679, italics omitted.) Cross-examination is permitted not only to test the witness' perceptions and memory but also to discredit the witness by, for example, revealing possible biases, prejudices or ulterior motives. (*Davis v. Alaska* (1974) 415 U.S. 308, 316 [39 L.Ed.2d 347, 353-354].)

A defendant may "explore whether a witness has been offered any inducements or expects any benefits for his or her testimony, as such evidence is suggestive of bias." (*People v. Brown* (2003) 31 Cal.4th 518, 544.) But a trial court may exclude such evidence under Evidence Code section 352. (*Brown*, at p. 545.) Here, the trial court did conduct an Evidence Code section 352 analysis, a determination we must uphold unless the trial court abused its discretion. (*People v. Sully* (1991) 53 Cal.3d 1195, 1220; see also *Brown*, at pp. 545-546.) But even if we were to assume the trial court erred in precluding cross-examination about the specific sentences Hammonds, Hernandez and Gonzales would have faced had they not cooperated with the People, any error was

harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684 [89 L.Ed.2d at p. 686] [confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]].)

As we have explained, independent evidence connecting defendant to the shooting corroborated the testimony of Hammonds, Hernandez and Gonzales. With regard to bias, the trial court instructed the jury to view the testimony from Hammonds, Hernandez and Gonzales, which tended to incriminate defendant, with caution. And the trial court told the jury to consider, among other things, the existence of a bias, interest or other motive in deciding the believability of a witness. Defendant was permitted to inquire into the possible biases and motivations for Hammonds, Hernandez and Gonzales to testify. Hammonds, Hernandez and Gonzales admitted they were present during the shooting. Hammonds admitted firing a gun. The jury learned that Hammonds, Hernandez and Gonzales lied to law enforcement authorities about the shooting before they entered into their plea agreements. The plea agreements were admitted into evidence. Although they testified they were in the car with defendant during the shooting, it was clear that the cooperating witnesses pleaded to fewer charges than defendant faced.

The jury also learned about the prison terms Hammonds, Hernandez and Gonzales understood they would receive under their plea agreements if the trial judge determined they had been truthful. Regarding the punishment they faced in the absence of the plea deals, Hammonds told the jury he knew he would have faced far greater time. He acknowledged his motivation in signing the plea agreement was to avoid spending the rest of his life in prison and he wanted to get the least amount of time possible. Gonzales said instead of facing a lot of time, he was getting 15 years. Hernandez similarly testified that he agreed to plead so he would receive 15 years instead of a lot more time. The jury received a great deal of evidence from which it could evaluate the possible biases,

prejudices or ulterior motives of Hammonds, Hernandez and Gonzales. In light of the entire record, the asserted evidentiary error was harmless.

III

We granted defendant's request to submit supplemental briefing on whether this matter should be remanded to permit the trial court to exercise its discretion to strike the section 12022.53 firearm enhancement allegations or findings pursuant to the recent amendment to section 12022.53, subdivision (h) (Sen. Bill No. 620 (2017-2018 Reg. Sess.)). In connection with count 1, the trial court imposed 25 years to life for the section 12022.53, subdivision (e)(1) enhancement. And in connection with counts 2 through 5, the trial court imposed one-third the midterm (six years eight months) for each of the section 12022.53, subdivision (e)(1) enhancements.

At the time the trial court sentenced defendant, section 12022.53, subdivision (h) provided: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Stats. 2010, ch. 711, § 5.) Effective January 1, 2018, however, Senate Bill No. 620 amended section 12022.53, subdivision (h) to grant a trial court discretion to strike or dismiss a section 12022.53 firearm enhancement at the time of sentencing or resentencing: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

Defendant argues Senate Bill No. 620 applies retroactively to his case. The Attorney General agrees.

"When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are

not yet final on the statute's operative date. [Citation.] We [base] this conclusion on the premise that ' "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law." ' " (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted, italics omitted; see *In re Estrada* (1965) 63 Cal.2d 740, 745.) The rule of retroactivity articulated in *Estrada* applies where the Legislature amends a statute to give the trial court discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76.) Because Senate Bill No. 620 gives a trial court discretion to strike or dismiss a firearm enhancement allegation or finding, which discretion the trial courts did not previously have, and nothing in section 12022.53 indicates the Legislature intended the amended statute to be prospective only, we conclude the amended section 12022.53 applies retroactively. (*In re Estrada, supra*, 63 Cal.2d at p. 745; *Francis, supra*, 71 Cal.2d at pp. 75-76; see *People v. Suarez* (2017) 17 Cal.App.5th 1272, 1288-1289 [even though the appellate court did not publish that portion of its opinion regarding Sen. Bill No. 620, it remanded the matter so that the trial court may exercise its discretion under section 12022.53, subdivision (h)], disapproved on other grounds as stated in *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 311-315.)

Citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, the Attorney General argues remand for resentencing is unnecessary because there is no likelihood the trial court would exercise its discretion to strike the firearm enhancement allegations. *Gutierrez* held in a similar context that a remand for resentencing is not required when "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*Id*. at p. 1896.)

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Brown* (2007) 147 Ca.App.4th 1213, 1228.) Thus, the general rule

is remand. In this case, we will not depart from the general rule. We express no opinion as to how the trial court should exercise its discretion on remand. We only conclude that, under the circumstances of this case, the trial court should be provided the opportunity to exercise its discretion in the first instance.

IV

In a second supplemental appellate brief, defendant sought reversal of his attempted murder convictions based on Senate Bill No. 1437 (2017-2018 Reg. Sess.).

The prosecutor argued to the jury that defendant was one of the shooters or was an aider and abettor. The jury found defendant was not a shooter when it determined that he did not personally use a firearm; therefore, it convicted defendant of attempted murder as an aider and abettor. The trial court had instructed the jury on alternative theories of aiding and abetting: (1) directly aiding and abetting attempted murder, and (2) aiding and abetting assault with a firearm where the natural and probable consequence of the assault was attempted murder. The first theory required proof that defendant acted with intent to kill. (*People v. Lee* (2003) 31 Cal.4th 613, 624.) The second (the natural and probable consequences doctrine) did not. Instead, under the natural and probable consequences doctrine, the jury was required to find that defendant (1) acted with knowledge of the unlawful purpose of the shooter, (2) intended to commit, encourage or facilitate the commission of the target offense -- i.e., assault with a firearm, and (3) by act or advice aided, promoted, encouraged or instigated the commission of assault with a firearm. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262.) Assault with a firearm is a general intent crime; it does not require proof of a specific intent to cause injury. (*People v. Williams* (2001) 26 Cal.4th 779, 788.) In addition, conviction under the natural and probable consequences doctrine required a finding that (4) the shooter committed an offense other than the target crime -- here, attempted murder, and (5) attempted murder was a natural and probable consequence of the assault with a firearm which the defendant

aided and abetted. (*Prettyman*, at p. 262.) The verdict forms do not tell us upon which theory of aiding and abetting the jury relied in convicting defendant of attempted murder.

Among other things, Senate Bill No. 1437 was enacted to amend the natural and probable consequences doctrine as it relates to murder to ensure that murder liability is not imposed on a person who was not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723.) Effective January 1, 2019, Senate Bill No. 1437 amended section 188, which defines express and implied malice, and section 189, which defines the degrees of murder. (Stats. 2018, ch. 1015, §§ 2-3.) Pursuant to Senate Bill No. 1437, except as stated in section 189, subdivision (e) (the felony-murder rule), a murder conviction requires proof of malice aforethought; malice cannot be imputed to a person based solely on his or her participation in a crime. (§ 188, subd. (a)(3).)

Defendant argues Senate Bill No. 1437 eliminated the natural and probable consequences doctrine as a basis of aider and abettor liability for murder, and by implication, also eliminated the natural and probable consequences doctrine as a basis of aider and abettor liability for attempted murder. He claims that because it cannot be determined whether the jury relied on the natural and probable consequences doctrine to convict him of attempted murder, the attempted murder convictions must be reversed.

It is presently an open question whether Senate Bill No. 1437 applies to an attempted murder conviction. On the one hand, the amendment to section 188 and the new section 1170.95 mention murder but not attempted murder. On the other hand, defendant argued that inasmuch as principals must act with malice to be convicted of murder and malice cannot be imputed based solely on participation in a crime, an aider and abettor cannot be liable for attempted murder based on the natural and probable consequences doctrine, which does not require a finding of malice or intent to kill.

Nevertheless, contrary to defendant's request in his supplemental briefing, at oral argument his counsel indicated we need not resolve this open question now, because if Senate Bill 1437 applies to defendant, his remedy would be to petition the trial court pursuant to section 1170.95. The Attorney General agreed.

Based on the position of the parties at oral argument, we decline defendant's supplemental brief request to reverse his attempted murder conviction based on Senate Bill No. 1437.

DISPOSITION

The convictions are affirmed. The matter is remanded to permit the trial court to exercise its discretion regarding the section 12022.53 firearm enhancements. Depending on the exercise of its discretion, the trial court is directed to amend and/or correct the abstract of judgment to reflect the exercise of its discretion and the orally-imposed sentence on counts 1 through 5 and 11, and to forward a certified copy of the amended and/or corrected abstract of judgment to the Department of Corrections and Rehabilitation.

/S/
MAURO, J.

We concur:

/S/
ROBIE, Acting P. J.

/S/
RENNER, J.